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No. 03-1203

In the Supreme Court of the United States

RELIANCE STANDARD LIFE INSURANCE COMPANY, PETITIONER

v.

STEPHEN P. LASSER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

In his brief in opposition, respondent offers no compelling justification for denying certiorari on either of the questions presented by this petition. As to the first question: perhaps recognizing the ultimate futility of arguing that there is no circuit split, respondent primarily contends that this case presents a poor vehicle, either because the question was not properly preserved below or because the resolution of the question would not be outcome-dispositive. Neither point has any merit. Where an earlier decision of the court below controls the outcome, this Court has never forced a petitioner to engage in the futile step of challenging that decision below before proceeding here. That approach makes even more sense where, as here, the petitioner is contending that the court below did not merely err by applying its prior rule, but instead effectively articulated a *new* rule, itself in conflict with the decisions of other circuits. Moreover, for the reasons given in the petition and in Judge Garth's dissent, there can be no doubt that resolution of the question presented *would* be outcome-dispositive in this case. The circuits are plainly split on the question, and, as *amicus* American Council of Life Insurers persuasively demonstrates, the question has significant implications for the review of benefit determinations across the whole range of ERISA-covered benefit plans, and indeed for the provision of benefits more generally. Certiorari on this question should therefore be granted.

As to the second question: respondent's sole contention is that the different outcomes in the courts of appeals on the use of evidence regarding a claimant's return to work can be chalked up to variations in the governing policy language. This is wishful thinking. Some of those decisions involve materially indistinguishable policy language, and others do not depend at all on the policy language at issue. Particularly in light of the need for uniformity among the circuits on ERISA questions, certiorari on this question should also be granted.

REASONS FOR GRANTING THE PETITION

A. THE THIRD CIRCUIT ERRED BY APPLYING AN INSUFFICIENTLY DEFERENTIAL STANDARD OF REVIEW TO THE INSURER'S ELIGIBILITY DETERMINATION.

1. Respondent first contends that Reliance failed to preserve "[t]he issue of what is the appropriate standard to use in reviewing Reliance's denial of disability benefits" in the Third Circuit, and therefore cannot raise it here. Opp. 7. That contention is meritless.

As a preliminary matter, respondent's contention fails because it misapprehends the fundamental distinction between *issues* and *arguments*. The ultimate *issue* presented here is whether the lower court correctly reversed Reliance's denial of benefits to Dr. Lasser. There is no question that Reliance presented that issue below, and that the Third Circuit passed on it. *See, e.g.*, Pet. 5a (noting that "Reliance * * * argues that the District Court improperly held arbitrary and capricious its determination that Stephen Lasser was not disabled"). Respondent is contending merely that Reliance did not present a specific *argument* pertaining to that issue: namely, that the "sliding scale" standard previously adopted by the Third Circuit in *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377 (3d Cir. 2000), was insufficiently deferential to discretionary eligibility determinations by a conflicted administrator or fiduciary. It is axiomatic that once an *issue* is properly presented, "a party can make any *argument* in support of [its position]; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (same). Reliance is not raising a new issue here: instead, it is merely making an argument that was foreclosed below by settled circuit precedent.

Moreover, even if the argument that the "sliding scale" standard previously adopted by the Third Circuit was insufficiently deferential were somehow treated as a discrete "issue," this Court has never required a petitioner to preserve a challenge on an issue controlled by an earlier decision of the court below by going through the motions of challenging the decision in that court. In the Third Circuit, as elsewhere, a panel is barred from reconsidering the decision of a previous panel. *See, e.g.*, *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 300 (3d Cir. 1999).[1] This Court has routinely granted certiorari in cases in which the decision under review was controlled by an earlier decision, seemingly without regard to whether the decision was challenged in that court. *See, e.g.*, *United States v. Knight*, 534 U.S. 112, 116 (2001); *Carter v. United States*, 530 U.S. 255, 260 (2000); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 75 (1998). And that practice is entirely in accord with the general rule that this Court will grant review on issues that were "not pressed" below, provided they were "passed upon" by the lower court. *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991).

Finally, the very premise of respondent's argument—namely, that Reliance is contending that the "sliding scale" standard previously adopted by the Third Circuit was insufficiently deferential—is incorrect. In its petition, Reliance did not assert

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[1] Respondent implies that, even if Reliance were not required to challenge the Third Circuit's prevailing standard of review before the panel below, it should have done so in its petition for rehearing *en banc*. *See* Opp. 8. A party need not file a petition for rehearing *en banc*, however, before filing a petition for certiorari in this Court. *See* 28 U.S.C. § 2101(c); S. Ct. R. 13.3. Just as a party need not ordinarily raise an issue in a post-trial motion in order to preserve it for review by the court of appeals, so too is it true that a party need not raise an issue in a petition for rehearing *en banc* in order to preserve it for review by this Court.

that the "sliding scale" standard of review was necessarily inappropriate: instead, Reliance asserted only that the Third Circuit erred by effectively applying a *de novo* standard of review (in conflict both with its earlier decision in *Pinto* and with the decisions of other circuits), *see, e.g.*, Pet. 9, and that reversal would be appropriate under *any* more deferential standard of review (*including* the "sliding scale" standard of review adopted in *Pinto*), *see, e.g.*, *id.* at 15-16. Reliance could hardly be expected to have preserved its challenge to the Third Circuit's effectively *de novo* standard of review before the panel had even minted it, and Reliance plainly *did* preserve that challenge, to the extent it was necessary to do so, in its petition for rehearing *en banc*. *See, e.g.*, Opp. 5a. For all of these reasons, respondent's attempt to manufacture a vehicle problem should be rejected.

2. Respondent contends that certiorari should be denied because "the choice of standard of review would not affect the outcome here." *Id.* at 8. That contention likewise lacks merit.

Far from providing a reason for *denying* certiorari here, the facts of this case suggest that it would be a particularly *good* vehicle for consideration of the appropriate standard of review. In its decision, the Third Circuit simply reweighed the evidence before Reliance on whether Dr. Lasser was disabled under the terms of Reliance's policy, ultimately choosing to credit the opinions of two of Reliance's physicians over that of a third. *See* Pet. 15a-19a. Moreover, not one of the various objective diagnostic tests used to evaluate Dr. Lasser's condition suggested that he was disabled, as the majority itself conceded. *See id.* at 16a. Indeed, as Judge Garth noted in his dissent, the administrative record in this case was "replete with evidence" supporting Reliance's decision. *Id.* at 30a. It is therefore clear that, under a deferential standard of review, Reliance's decision to deny benefits would have been upheld.

In contending that the choice of the standard of review is irrelevant here, respondent relies heavily on dicta in the district

court's decision to the effect that Reliance's denial of benefits to Dr. Lasser would "'require reversal under any standard.'" Opp. 8 (quoting Pet. 41a) (emphasis omitted). Notably, however, the Third Circuit, in reviewing the district court's decision, made no such statement—even though the Third Circuit, after paying "lip service" to a deferential standard of review, Pet. 22a (Garth, J., dissenting), ended up affording no real deference at all. To the extent the Third Circuit effectively adopted a less deferential standard of review, it erred; to the extent the Third Circuit did apply (or should have applied) a more deferential standard of review, it should have reversed. In either event, this is not a case in which resolution of the question presented would have no effect on the ultimate outcome, and certiorari should therefore be granted.[2]

3. Respondent halfheartedly contends that, while the courts of appeals have not used the "exact same words" in articulating the standard of review for discretionary eligibility determinations by a conflicted ERISA administrator or fiduciary, no genuine circuit split exists on the issue. Opp. 14. Respondent is mistaken.

As a preliminary matter, respondent simply ignores the fact that the Court has recently, and expressly, left open this very question. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 384 n.15 (2002). Respondent likewise ignores the statements of some of this Nation's most respected jurists, explicitly recognizing that the courts of appeals are divided on the issue. *See, e.g., Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 378 (3d Cir. 2000) (Becker, then-C.J.); *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999) (Boudin, J.).

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[2] Moreover, to the extent there is any doubt as to whether the resolution of the question presented would automatically be outcome-dispositive, that is no reason to deny certiorari. In cases involving the choice of a standard of review, this Court routinely remands for application of the selected standard. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

Instead, respondent seeks to downplay the obvious split in the circuits by redefining the question presented, suggesting that this case presents only the issue of the degree of deference owed to a discretionary eligibility determination by a conflicted administrator or fiduciary *when there is no actual evidence that the conflict affected the decision*. *See, e.g.*, Opp. 10. Even if the question presented could be so narrowed, the circuits would remain divided. As catalogued in the petition, *see* Pet. 12-15, the circuits fall into three categories, with the First, Second, Sixth, Seventh, and Ninth Circuits generally holding that the mere existence of a structural conflict is insufficient to justify applying a less deferential standard of review; the Fourth, Fifth, and Tenth Circuits employing a "sliding scale" standard, under which a more deferential standard of review would presumably apply in cases in which there is no actual evidence that the conflict affected the decision; and the Eighth and Eleventh Circuits seemingly holding that the mere existence of a structural conflict is *always* sufficient to justify applying a less deferential standard of review.

Confronted with this abundance of conflicting case law, respondent merely quibbles with the placement of particular circuits in these three categories. Respondent's characterization of the law in these circuits, however, varies from the merely disingenuous to the affirmatively inaccurate.

Seventh Circuit. Respondent contends that the Seventh Circuit has not held that the mere existence of a structural conflict is insufficient to justify applying a less deferential standard of review, but instead has applied a "sliding scale" standard. *See* Opp. 13. The Seventh Circuit has expressly stated, however, that "[t]he existence of a potential conflict is not enough" to justify applying a less deferential standard. *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998). Although the Seventh Circuit's earlier decision in *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir.

1987), does discuss the "sliding scale" standard, the Seventh Circuit in *Mers* cited *Van Boxel* approvingly for the proposition that "we have *rejected* the theory that an inherent relational conflict is sufficient to alter the standard of review," 144 F.3d at 1020 (emphasis added). And in a decision released after the petition for certiorari in this case was filed, the Seventh Circuit, citing *Mers*, has reaffirmed that the full-fledged arbitrary-and-capricious standard of review applies absent material evidence that the conflict affected the insurer's decision: indeed, the Court noted that the more deferential standard of review applied "[u]nless an insurer or plan administrator pa[id] its staff more for denying claims than for granting them." *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 409 (7th Cir. 2004) (Easterbrook, J.).

Second Circuit. Respondent contends that the Second Circuit has suggested that the existence of a conflict is a factor to be weighed in determining whether there has been an abuse of discretion, even absent evidence that the conflict affected the decision to deny benefits. *See* Opp. 11 (quotation omitted). Specifically, respondent quotes the Second Circuit's decision in *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89 (2d Cir. 2000), for the proposition that a "[structural] conflict of interest is 'a factor to be weighed in determining whether there has been an abuse of discretion,'" Opp. 11 (quoting *Pulvers*, 210 F.3d at 92) (internal quotation omitted). The full quotation from *Pulvers*, however, actually states that "[t]he fact that UNUM served as both plan administrator and plan insurer, although a factor to be weighed 'in determining whether there has been an abuse of discretion,' *is alone insufficient as a matter of law to trigger stricter review*." 210 F.3d at 92 (emphasis added). And *Pulvers*, in turn, was quoting from the Second Circuit's earlier decision in *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251 (2d Cir. 1996), which stated in no uncertain terms that a claimant was entitled to a less deferential standard of review only if the claimant showed that "the administrator was *in fact* influenced by the conflict of interest," *id.* at 1256 (emphasis

added).

Ninth Circuit. As with the Second Circuit, respondent contends that the Ninth Circuit "takes the structural conflict of interest into account when conducting a review under the arbitrary-and-capricious standard," even absent evidence that the conflict affected the decision to deny benefits. Opp. 14. Again, however, in the very decision on which respondent relies, the Ninth Circuit expressly noted that "we must review the decisions of an apparently conflicted employer- or insurer-fiduciary under the traditional abuse of discretion standard *unless it appears that the conflict may have influenced the decision.*" *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech.*, 125 F.3d 794, 798 (9th Cir. 1997) (emphasis added). Notably, that holding is consistent with a wealth of other decisions from the Ninth Circuit, which make clear that a more deferential standard of review applies absent "material, probative evidence" that the conflict affected the decision. *See, e.g., Alford v. DCH Found. Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir. 2002); *Nord v. Black & Decker Disability Plan*, 296 F.3d 823, 829 (9th Cir. 2002), *rev'd on other grounds*, 123 S. Ct. 1965 (2003); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995).

Eighth Circuit. Finally, respondent contends that the Eighth Circuit does not hold that the mere existence of a structural conflict is *always* sufficient to justify applying a less deferential standard of review, but instead applies the "sliding scale" standard. To be sure, in *Woo v. Deluxe Corp.*, 144 F.3d 1157 (8th Cir. 1998), an Eighth Circuit panel did seemingly adopt the "sliding scale" standard, *see id.* at 1161. In an earlier decision, however, another Eighth Circuit panel seemingly rejected that approach, holding (in reliance on an earlier Eleventh Circuit decision, and over Judge Beam's dissent) that "a relationship that places an ERISA benefits plan administrator in perpetual conflict warrants a higher level of scrutiny." *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997)

(internal quotation omitted). At most, therefore, the Eighth Circuit's subsequent decision in *Woo* shows that there is an intracircuit conflict on the standard-of-review issue—not that the Eighth Circuit has definitively adopted the "sliding scale" standard. *Cf.* ACLI Br. 8-9 (discussing *Woo* and other cases).

4. Finally, respondent offers no answer to Reliance's contention that this issue is a recurring one of considerable significance. *See* Pet. 16. As *amicus* American Council of Life Insurers has demonstrated, the question of the appropriate degree of deference owed to discretionary eligibility determinations by a conflicted ERISA administrator or fiduciary arises in a variety of factual contexts—from decisions regarding coverage for health, disability, and life insurance, *see* ACLI Br. 10-11, to decisions regarding the availability and level of pension benefits, *see id.* at 11. And the ongoing uncertainty in the law on this question has increased the cost of providing benefits, and even created incentives for smaller employers not to provide benefits at all. *See id.* at 11-15. If allowed to stand, the Third Circuit's decision threatens to enable courts in that circuit, like courts in others, to substitute their own judgments for those of better-situated plan administrators and fiduciaries. In light of the disarray in the lower courts and the importance of this issue, this Court's review is warranted.

B. THE THIRD CIRCUIT ERRED BY REJECTING THE INSURER'S RELIANCE ON EVIDENCE THAT THE CLAIMANT HAD RETURNED TO WORK.

1. Respondent contends that certiorari should be denied on the question whether an insurer could properly consider evidence that the claimant had returned to work in denying benefits, on the ground that the conflicting court of appeals decisions involved different policy language. *See* Opp. 15-18. Contrary to respondent's suggestion, however, *see id.* at 16, the relevant policy language at issue in *Deegan v. Continental Casualty Co.*, 167 F.3d 502 (9th Cir. 1999), was almost

identical to that at issue here, with the policy defining a claimant as disabled if the claimant was "continuously unable to perform the substantial and material duties of his regular occupation," *id.* at 507; *cf.* Pet. 42a (defining a claimant as disabled if the claimant was not "capable of performing the material duties of his/her regular occupation" on a full-time basis). Similarly, in *Galman v. Prudential Insurance Co.*, 254 F.3d 768 (8th Cir. 2001), the Eighth Circuit considered a policy that defined "total disability" as "not working at any job," *id.* at 771. Respondent offers no explanation for why the definitions of "disability" at issue in those cases would mandate a different outcome from the definition at issue here. And respondent does not deny that those decisions that have refused to allow insurers to consider evidence of a return to work have done so seemingly without *any* regard to the pertinent policy language. *See Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914, 918 (7th Cir. 2003); *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1326 n.6 (11th Cir. 2001).

2. Again, respondent offers no answer to Reliance's contention that this issue is a recurring one of considerable significance. *See* Pet. 20. If allowed to stand, the Third Circuit's decision, like those of other circuits, will allow claimants to recover benefits as a *supplement* to their income—in contravention of the basic premise of long-term disability insurance, which is to provide benefits as a *replacement* for a claimant's regular income. Given the significant implications of this rule, and given the proliferation of court of appeals decisions addressing the issue in recent years, the Court's review is warranted on this question as well.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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